84-812

No.

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In the

Supreme Court of the United States

OCTOBER TERM, 1984

GRAND TRUNK WESTERN RAILROAD,

Petitioner,

v.

MULAY PLASTICS, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States District Court of Appeals for the Seventh Circuit erred in holding an order not immediately appealable under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), which order directed payment by prevailing party of losing party's attorney's fees and costs, in contradiction to the American Rule and without basis in law?

PARTIES

The Grand Trunk Western Railroad Company, filing this petition for writ of certiorari as appellant in this proceeding, states that:

A. This is the original designation of corporate relationships.

B. Grand Trunk Western Railroad Company is wholly owned by Grand Trunk Corporation, a Delaware corporation. Grand Trunk Corporation is in turn wholly owned by Canadian National Railway Company, a Canadian Crown corporation.

C. Grand Trunk Western Railroad Company has interest in the following subsidiary corporations: Belt Railway Company of Chicago, Chicago & Western Indiana Railroad Co., and none others (other than wholly-owned subsidiaries).

D. Other subsidiaries of the parent of Grand Trunk Western Railroad Corporation are the Duluth, Winnipeg & Pacific Railway

Company, a Minnesota corporation; and the Central Vermont Railway Company, a Vermont corporation.[1]

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1. Parties in the action in the Federal District Court for the Northern District of Illinois, Eastern Division, case no. 82 C 7631, are as follows: Mulay Plastics, Inc., a corporation, plaintiff, vs. Grand Trunk Western Railroad Company, a corporation, and Dobson Heavy Haul, a corporation, defendants, and Grand Trunk Western Railroad Company, third-party plaintiff, vs. Prestolite Company, third-party defendant.

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Cobbledick v. United States, 309 U.S. 323 (1940).

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

6 Moore's Federal Practice, Par. 54.70 [2]; Par. 54.77 [2].

Hall v. Cole, 412 U.S. 1 (1973).

Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir. 1978).

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GRAND TRUNK WESTERN RAILROAD,

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v.

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Respondent

PETITION FOR WRIT OF
CERTIORARI - CIVIL CASE

OPINIONS BELOW

The opinion of the District Court for the Northern District of Illinois, Eastern Division, is reported at 102 F.R.D. 130. The opinion of the Court of Appeals for the Seventh Circuit is reported at 742 F.2d 369.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on August 22, 1984, and a copy thereof is appended to this petition in the Appendix. The jurisdiction of this Court is invoked under Chapter 28, U.S. Code, §1254(1).

STATUTORY PROVISIONS

Chapter 28 U.S.C. §1291, Final Decisions of District Courts:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in Court of First Instance

The United States District Court for the Northern District of Illinois, Eastern Division, has jurisdiction of this matter under Title 28 U.S.C. §1332 because of diversity of citizenship between the parties and the amount in controversy exceeds $10,000 exclusive of interest and costs. Said Court also has jurisdiction of this cause under Title 28 U.S.C. §1331 because the controversy involves the Carmack Amendment of 1906, Title 49 U.S.C. §11707.

B. Nature of the Case

This Petition for Writ of Certiorari arises out of a railroad freight claim brought in the District Court under the Carmack Amendment, 49 U.S.C. §11707. It was filed against the Grand Trunk

Western Railroad Company ("GTW") on December 13, 1982 by Mulay Plastics, Inc. ("Mulay"). Mulay seeks $402,847.77 as damages sustained as a result of the transportation of the clamp end of a National Automatic Tool Company ("NATCO") twelve hundred ton plastic injection molding machine ("the machine"). While other parties and theories of recovery are involved in the action, the collateral order appealed from here arose out of motion practice involving the above-described, jurisdictional claim.

B. Relevant Course of Proceedings--Judgment for Attorneys' Fees

On September 30, 1983, the district court entered a memorandum opinion and order finding that Mulay was entitled to summary judgment against GTW under the Carmack Amendment. Evidence developed in subsequent depositions indicated that

Mulay was not entitled to summary judgment. Accordingly, the district court vacated its earlier memorandum opinion and order. However, it found that GTW had breached "... an affirmative duty to file material in opposing ... summary judgment ..., albeit not deliberately." (Memo. Opinion, p. 4). Characterizing this failure as "vexatious conduct" (Memo. Opinion, p. 6), it ordered GTW to pay the instant expenses and attorneys fees to Mulay. The court relied upon "equitable powers" as a basis for imposing attorneys fees and costs (Memo. Opinion, p. 9).

GTW appealed. The Court of Appeals for the Seventh Circuit preliminarily concluded that the appeal was from a non-appealable interlocutory order and that the appeal was premature. Accordingly, the Court of Appeals ordered the parties to file memoranda stating the

jurisdictional basis of the appeal.

In considering this case, the Seventh Circuit consolidated it with a dissimilar case on appeal from the imposition of sanctions for abuse of discovery under the Federal Rules of Civil Procedure. The Appellate Court found:

> "the order to pay is not final in the sense of winding up a lawsuit, and is appealable, if at all, only under the "collateral order" doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47 (1949). ...
>
> "As there is nothing irreparable about the harm that the order to pay has done the appellant, appeal under the Cohen doctrine is not permissible. ..."

C. Relevant Facts

Early in 1981, Mulay purchased three used NATCO plastic injection molding machines from Prestolite Motors Division of Eltra Company in Bay City, Michigan. The clamp assemblies--consisting of removable bases, stationary platens and

movable platens--of two of the machines--both twelve hundred ton of similar vintage and design--were, at different times, shipped by rail from Bay City, Michigan, to, respectively, Addison, Illinois, and Holly Springs, Mississippi. The first was reported damaged by the Illinois Central Gulf Railroad at Markham, Illinois, and is the subject of this suit.

In both instances, the clamp assemblies were loaded on open flat cars by Dobson Heavy Haul, Inc. for the rail movements. In both instances, Dobson bolted the bases to the cars, "blocked in" the bases with timbers or angle iron, and braced the movable platens in an open position with timbers. Both loads were measured by a railroad carman, who also checked the external integrity of the rigging. For the second movement, rigged after the damage to the first had

been reported, Dobson also secured the entire load to the car with heavy cables.

The machine was shipped on GTW by Prestolite under a straight bill of lading dated February 6, 1981. Representatives of the shipper and the rigger signed the bill, certifying that the machine was in proper condition for transportation. After the damage was reported, the load was inspected at Markham, Illinois by representatives of Mulay, GTW and NATCO. The platen components of the clamp assembly had moved forward fifty to seventy inches on the base. The base itself remained securely affixed to the flat car. The movable platen had not closed. In brief, the existing rigging, approved by GTW's carman, had not failed.

However, four internal "locator dowels" designed by NATCO to hold the clamp assembly to its base during operation--were, on internal examination of

the machine at Markham by a NATCO representative, reported missing. These dowels were later found inside the base during the course of repairs at NATCO's Richmond, Indiana plant. Each dowel showed evidence of wear attributable to movement of the platen asssembly on the base. This movement was, in turn, attributed to a failure to properly tighten the dowels during normal maintenance. In the opinion of NATCO's recently retired service manager, a man with over twenty-five years of experience with these machines, the dowels had fallen "... out possibly before it ever moved out of Prestolite." (Deposition of Robert L. Wehrley). In his opinion, it is unlikely that properly tightened dowels would loosen and/or fall out as a result of impact. In his opinion, the load shifted because the dowels were not in place.

Presently, before shipping a machine, NATCO removes the platen assembly from the base and places it in a special shipping frame. It adopted this practice five years ago. In the past, it used cables to guard against shifting of the platen assembly on the base

The load was not "humped" by GTW. GTW does not have a "hump" (a gravity classification yard) in its system. In addition, GTW follows the Association of American Railroads "careful switching rule" and prohibits car couplings at speeds in excess of four miles per hour. GTW's records do not reflect any mishap or improper handling of the machine The record herein, similarly, contains no such evidence.

ARGUMENT

This petition for certiorari should be granted for the reasons:

I. That the Seventh Circuit Court of Appeals has found the order of the District Court nonappealable in conflict with this Supreme Court's holding in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), and cases thereunder.

II. The Seventh Circuit Court of Appeals has sanctioned such a departure by the District Court for the Northern of Illinois, Eastern Division, from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision;

III. To resolve a conflict between the Tenth Circuit on one hand and the Seventh and other circuits on the other hand concerning the question of appealability of orders imposing sanctions.

I. Conflict with Applicable decisions of the Supreme Court.

This case is not about the recent amendments to the Federal Rules of Civil Procedure. This case is not about abuse of discovery proceedings. The District Court below explicitly stated that the discovery was not improper (Memorandum Opinion, p. 3, note 3).

This case is not about unreasonable multiplication of proceedings under Chapter 28, U.S.C. §1927, as the District Court below found that section not applicable (Memorandum Opinion, p. 9). Further, the District Court noted that GTW's attorneys were not at fault (Memorandum Opinion, p. 5, note 5).

This case is not about money. As the Court of Appeals correctly observes, both appellant and appellee are substantial corporations. The $3,820.70 ordered to be paid is dwarfed by the aggregate

costs of these proceedings, and the amount in controversy in the principal claim.

What this case is about is the patently wrongful imposition of a sanction by the District Court.

The District Court, after examining many tentative bases for its imposition of a sanction against Grand Trunk concluded:

> "Justice requires that if that ruling (order granting summary judgment) is now vacated, Grand Trunk must reimburse Mulay for the wasted efforts it caused." (Memorandum Opinion, pp. 7-8).

> "Here this Court invokes its equitable powers because the interest of justice require it to do so. ..." (Memo. Opinion, p. 9)(Parenthesis portion supplied.)

In short, the Court has no authority in statute or precedent to support its remarkable order requiring the prevailing party to pay the losing party attorney's fees.

What the District Court proposes is a change in the American Rule that each party bear the burden of his own attorney's fees. A more consistent logical extension of the District Court's order is that where a party has been put to the trouble of responding in litigation and he prevails, he should have an award of fees and costs. Certainly the equity of this proposition has been found to be appealing in jurisdictions other than the United States, but it is not the law here. The District Court's order is contrary to the American Rule.

Contrary to the decision of the Court of Appeals, this kind of collateral order of the District Court is appealable under prior decisions of this United States Supreme Court.

"'Finality as a condition of review is an historic characteristic of federal appellate procedure.'" Flanagan v. United

States, 104 S.Ct. 1051, 1054 (1984), quoting Cobbledick v. United States, 309 U.S. 323, 324 (1940). But departures from the final judgment rule have been allowed "when observance of it would practically defeat the right to any review at all." Cobbledick, supra, 309 U.S. at 324-325. Thus, the Supreme Court, in a case similar to that at bar, recognized the Collateral Order Doctrine. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). There, in addressing the threshold question of appealability, the Court stated:

> "It is obvious that if Congress had allowed appeals only from those final judgments which terminate an action this order would not be appealable.
>
> "The effect of the statute [20 USC §1291] is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But

the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.

"Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps toward final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

"This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute

this practical rather than a technical construction. Bank of Columbia v. Sweeney, 1 Pet 567-579; United States v. River Rouge, 269 US 323, 328.

"We hold this order appealable because it is a final dispositon of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question."

Cohen, supra, 337 US 541, 546-547.

More recently, the Court has established three conditions for operation of the exception:

First, it "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of action"; third, it must "be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (Footnote omitted).

Flanagan, supra, 104 S.Ct. at 1055. The order at issue in this case plainly satisfies all three conditions.

1. The order here conclusively determines the disputed question, namely, whether GTW must pay as sanctions those of Mulay's expenses and attorneys fees associated with its abortive summary judgment motion. There are, simply, no further steps that could be taken in the District Court to avoid payment of sanctions.

2. The order here also resolves an important issue completely separate from the merits of the action.[1] The

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1. Cohen suggested that a collateral order must present "a serious and unsettled question," 337 U.S. at 547, and this case surely does: there is little that is more serious than the change in our system of litigation contemplated by Judge Shadur's order; see, 6 Moore's Federal Practice, Par. 54.70 [2]; Par. 54.77 [2]; and, although the law was settled (in GTW's favor) before the May 8, 1984 order, it certainly is not now, at least not in the Northern District of Illinois.

merits of the action, of course involve the statutory and common law liability of GTW, Dobson Heavy Haul and Prestolite to Mulay for the damages to the machine. The collateral issue here is whether the district court may, absent a finding of bad faith, direct payment by GTW of those of Mulay's litigation expenses and attorneys fees associated with its motion for summary judgment by the expedience of a finding of "vexatious conduct" and the invocation of the "interests of justice" dicta of Hall v. Cole, 412 U.S. 1, 4-5 (1973). The collateral issue is not, conceptually, related to the merits of the action. It is important in that it represents a substantial change from accepted American practice.

3. Finally, the order here is effectively unreviewable on appeal from a final judgment. GTW was ordered to pay

by May 21, 1984. Final judgment is many months away.

The function of the District Court's order is to impose a sanction upon GTW. Payment of the money presses the sanction down upon GTW and the purpose of the order is achieved. It is of no matter that the money may be recovered months or years hence. The litigant has been wrongfully dealt with. Once the sanction is paid, it is done; the litigant is punished and chastened. In practical terms, there is no relief if there is no immediate appealability of this order.

Contrary to the requirements of Cohen, the Court of Appeals has looked at the question of effective reviewability upon appeal in technical terms rather than practical terms. The Court of Appeals would require "irreparable harm", whereas the United States Supreme Court, in Coopers & Lybrand v. Livesay (above)

merely finds that order must be "effectively unreviewable upon appeal from a final judgment."

II. Departure From Usual Course of Judicial Proceeding: Court's Power of Supervision

The District Court here has novelly and expansively interpreted its equitable powers to impose sanctions where not done so before. Bad faith, willfulness, and knowing concealment are absent and yet punishment is imposed.

It is fundamental fairness to require fault before punishment is imposed. The standards of fault for the imposition of attorneys' fees are well known. The District Court chooses not to abide by them.

The District Court has departed from the accepted and usual course of judicial proceedings in its order. The Court of Appeals has glossed over this

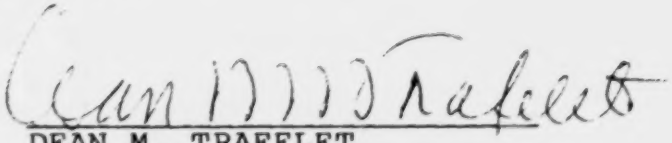
novelty by consolidating GTW's appeal with a dissimilar case, and sanctioned the departure of the District Court.

This Supreme Court, in the exercise of its supervisory powers, should grant certiorari.

III. Conflict Between Circuits

The Court of Appeals found the question presented by this case and the case consolidated upon appeal to be a likely recurrent question. The Court of Appeals also notes that its opinion is in conflict with, and there is a conflict between the Tenth Circuit and other circuits presented by, Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1372 (10th Cir. 1978). This Supreme Court ought to grant certiorari to

resolve this conflict.



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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MULAY PLASTICS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 76 C 7631
	)	
GRAND TRUNK WESTERN RAILROAD CO., et al.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

On September 30, 1983, Mulay Plastics, Inc. ("Mulay)" obtained summary judgment under Fed. R. Civ. P. ("Rule") 56 against Grand Trunk Western Railroad Co. ("Grand Trunk") on the issue of Grand Trunk's liability for damages sustained by its NATCO 1200 V-103 Injection Molding Machine (the "Machine") while in transit on a Grand Trunk flatcar. 1/ Though Mulay also contends Grand Trunk is liable under state law for negligence, the Opinion dealt only with Grand Trunk's liability under the Carmack Amendment, 49 U.S.C. §20(11). 2/

1/ This Court found Mulay entitled to summary judgment as to liability in its memorandum opinion of that date (the "Opinion").

2/ In addition to Mulay's claims against Grand Trunk, this litigation includes:

[begin p. 2:] Later events have called into question the propriety of that summary judgment, at the same time triggering the attorneys' fees problem now before this Court:

1. On February 8, 1984 (during discovery on the issue of damages) Robert L. Wehrley ("Wehrley"), a former employee of the Machine's manufacturer National Automatic Tool Co. ("National"), testified to events that may afford Grand Trunk a defense against Carmack Amendment liability.

2. On February 17 Grand Trunk moved to vacate the Opinion, relying principally on Wehrley's testimony.

Footnote Continued

1. Mulay's claims against Dobson Heavy Haul, Inc. ("Dobson"), the trucking company that delivered the Machine to Grand Trunk, for negligence and breach of contract in connection with Dobson's fastening the Machine to Grand Trunk's flatcar;

2. Grand Trunk's cross-claims for contribution against Dobson and Prestolite Company ("Prestolite"), the company that sold the Machine to Mulay; and

3. Grand Trunk's counterclaim against Mulay for payment of freight charges.

3. On February 29 Mulay moved for a "protective order" prohibiting Grand Trunk "from introducing any deposition testimony pertaining to the issue of Grand Trunk's liability to Mulay obtained subsequent to ... September 30, 1983."

4. On March 16 this Court denied that motion and granted Grand Trunk's motion to vacate, conditioned on Grand Trunk's payment to Mulay of the expenses of its Carmack Amendment summary judgment motion.

5. On April 5 Grand Trunk moved for "reconsideration and/or clarification" of the order requiring it to pay expenses incurred by Mulay, and this Court denied that [begin p. 3:] motion.

At this point Mulay has filed its petition for exenses, Grand Trunk has responded and Mulay has replied. Grand Trunk's response continues its opposition to the propriety of an award of expenses in this situation. Accordingly this opinion and order memorialized the legal justification for this Court's earlier actions (previously stated orally) and requires Grand Trunk to pay Mulay $3,820.70.

Motion to Vacate Summary Judgment

When Grand Trunk first produced Wehrley's deposition, the parties framed the issue in terms of whether or not the

Opinion should be vacated. 3/ Because the Opinion was not a final order, this Court of course has power to vacate it (and to that extent the parties agree). See John Simmons Co. v. Grier Brothers Co., 258 U.S. 82, 88 (1922). Whether this Court ought to exercise its discretion to do that depends on the circum-[begin p. 4:] stances.

Above the Belt, Inc. v. Mel Bohannon Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983) points out motions for reconsideration of interlocutory orders are non-Rules motions that are seldom appropriate. Nevertheless it notes (citing Judge Cardozo) the classic case in which reconsideration is appropriate is that

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3/ Mulay also presented the alternative of placing the Wehrley deposition under a "protective order," but that opinion was clearly inappropriate. It would suggest all discovery as to liability was improper and in violation of some implicit command in the September 30 summary judgment order, but:

1. Discovery on liability issues was certainly permissible. Grand Trunk's crossclaims against Dobson and Prestolite were pending, and liability had not been resolved on those claims.

2. In any case no court order had ever limited discovery to investigation of the extent of damages.

3. Finally the Wehrley deposition had been primarily focused on damages issues anyway.

of "the defeated party who acquires favorable evidence after the ruling." That however does not end the inquiry. In O'Byrne v. Cheker Oil Co., 727 F.2d 159, 167 (7th Cir. 1984) our Court of Appeals recently upheld this Court's denial of reconsideration of a summary judgment motion because the appellant "had an affirmative duty to file material in opposing...summary judgment and could not properly file affidavits after summary judgment was granted to his opponent."

This Court concludes that affirmative duty was breached by Grand Trunk, albeit not deliberately. Grand Trunk's asserted new defense 4/ to Carmack Amendment liability depends on whether certain dowels connecting the top and bottom of the Machine were in place when Grand Trunk took custody of the Machine, or instead had fallen down into the base of the Machine. Whether Grand Trunk, after having failed to advance that defense earlier, was reasonable in that omission depends on whether Grand Trunk was put on notice of that potential defense [begin p. 5:] and could reasonably be expected to have pursued the possibility.

Wehrley's deposition itself shows Grand Trunk had adequate notice. In response to questioning by Grand Trunk's attorney James A. Romanyak, Wehrley testified he, together with Mulay's Ken Munro ("Munro") and Grand Trunk's Anguilm ("Anguilm"), looked for the dowels when

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4/ This opinion does not pass on the sufficiency of that defense, which remains for another day.

the Machine arrived at National for repairs (Wehrley dep. 45):

> Q. Did you have any conversation with them [Munro and Anguilm] about missing locator dowels?
>
> A. I might have suggested something about it at that time.
>
> Q. Did you suggest it to Ken Munro?
>
> A. I think so because we looked for them at that particular time.
>
> Q. The three of you looked for them?
>
> A. Yes.
>
> Q. Were you able to find them?
>
> A. No, because they were still on the railroad car and I couldn't see where I wanted to see. But we didn't.

That hunt for the dowels really provided as much notice as a party to commercial litigation can expect to receive from a disinterested witness with knowledge of potentially exculpatory facts. 5/

Grand Trunk's April 5 motion for reconsideration asserts [begin p. 6:] two reasons it was not really in breach

---

5/ Anguilm, not Grand Trunk's attorneys, received the notice. This Court's finding that Grand Trunk is at fault for its belated tendering of evidence is therefore no reflection on the quality of its attorneys' representation here.

of its duty to come forward with evidence on summary judgment:

1. Wehrley never specifically said he told Munro and Anguilm what effect the absence of the dowels might have. Instead he used the phrases "I might have suggested" and "I think so." Because the Machine is complex, Munro and Anguilm could not have understood the significance of their search.

2. If Anguilm is chargeable with notice, so is Munro. Grand Trunk and Mulay are thus equally at fault for Grand Trunk's failure to produce the evidence.

Neither of those arguments is persuasive:

1. Grand Trunk's duty to come forward with evidence makes the search for the dowels itself the relevant factor, for at that point Grand Trunk was on notice giving rise to a duty to pursue the issue. Its agent Anguilm should then have posed the same questions to Wehrley that its lawyers put to him some years later at the deposition. Any other view, in which Wehrley would have had to give an express statement of the entire exculpatory scenario to Anguilm, is simply too narrow a reading of the duty to exercise diligence in producing evidence.

2. Mulay of course had no duty (as Grand Trunk did) to produce evidence exculpatory to Grand Trunk.

But this Court cannot fairly end its inquiry with the conclusion Grand Trunk is at fault for its belated production [begin p. 7:] of Wehrley's testimony. If the Opinion were left intact, anomalous results could ensue in this multiparty litigation: After all, the issues of Dobson's liability to Mulay and Dobson's and Prestolite's liability to Grand Trunk are still open, and Wehrley's testimony might affect the outcome of those issues (though barred from consideration as between Mulay and Grand Trunk). Indeed denying Grand Trunk's motion to vacate summary judgment would be much like subjecting it to a default judgment while ignoring potentially exculpatory evidence. Default is a harsh sanction (see C.K.S. Engineers, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202, 1205 (7th Cir. 1984), at least where Grand Trunk's conduct was not willful.

Those countervailing considerations caution striking a middle ground between simply granting and simply denying reconsideration of the Opinion. Granting reconsideration, but at the same time requiring Grand Trunk to pay Mulay's attorneys' fees and expenses caused by its failure to produce evidence, achieves that middle ground. Grand Trunk was put on notice of a potential fact issue and did not pursue it. Had the controverted fact issue been posed, there would have been no occasion for Mulay to seek summary judgment.

As it was, Mulay and its attorneys properly saw the questions of which they were aware as purely legal and not factual. They went to the time, trouble and expense of filing and pursuing a

summary judgment motion, and in fact obtained a favorable ruling on that motion. Justice requires that if that [begin p. 8:] ruling is now to be vacated, Grand Trunk must reimburse Mulay for the wasted efforts it caused.

Grand Trunk continues to object to the award of fees, asserting this Court is powerless to award attorneys' fees in the absence of bad faith or statutory authorization because the "American Rule" requires each party to pay its own attorneys. 6/ However the Rules have been construed to empower federal courts to condition rulings on the payment of litigation expenses in analogous situations. For example voluntary dismissal of a claim under Rule 41(a)(2) may be conditioned on the payment of attorneys' fees and expenses. GAF Corp. v. Transamerica Insurance Co., 665 F.2d 364, 367-70 (D.C. Cir. 1981)(Swygert, J.). And Rule 60(b) permits relief from a final judgment to be granted "upon such terms as are just." 7/

6/ By objecting only to the fee award on which reconsideration of the Opinion has been based, Grand Trunk picks and chooses the portions of the reconsideration order it likes. But the ability to make Mulay whole is one of the important factors this Court has weighed in the balance in ultimately deciding to grant reconsideration.

7/ In a different context, Rule 60(b) has been held not to apply to interlocutory orders. See Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 862 (5th Cir. 1970). However, the rationale

Although not of course directly applicable, 28 U.S.C. [begin p. 9:] §1927 permits litigation expenses to be awarded against attorneys if they have "multiplie[d] the proceedings in any case unreasonably...." It would be odd (even though possible) to permit that sort of conduct by counsel to cause their being mulcted in damages in the form of opposing counsel's fees, while the identical conduct by a party itself could not bring about the same result.

Here this Court invokes its equiable powers because the interests of justice require it to do so. In Hall v. Cole, 412 U.S. 1, 4-5 (1973)(footnotes omitted) the Supreme Court said:

> Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require.

Footnote Continued

for that holding is that a court should not be constrained by the requirements of Rule 60(b) in modifying orders on which no final order has been entered. By contrast, here Grand Trunk contends the interlocutory nature of the Opinion deprives this Court of a power otherwise available under Rule 60(b). That would turn justice--in the language of the Rule, "such terms as are just"--on its head.

It is true the Court there cited the bad faith exception to the American Rule as the principal example of the courts' equitable power to award attorneys' fees. But the bad faith exception includes not only bad faith conduct but also vexatious conduct. See 6 Moore, Moore's Federal Practice ¶54.77[2], at 1709 (2d ed. 1983) (earlier edition cited in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n.4 (1968)); id. at 1711 (fee awards "for dominating reasons of justice").

Our Court of Appeals has had no occasion to draw directly in the "interests of justice" exception to the American Rule to award attorneys' fees. Such an award, however, was considered and approved in Grinnell Brothers, Inc. v. Touche Ross & Co., [begin p. 10:] 655 F.2d 725 (6th Cir. 1981). There the trial judge disavowed any finding the losing party was in bad faith, but still granted attorneys' fees (id. at 727) "in the interest of justice" because the case had been improperly removed to federal court. Thus Hall v. Cole justified the award even though the bad faith exception did not.

Amount of Award

Mulay seeks $4,334.20 in litigation expenses,8/ and Grand Trunk argues no

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8/ Mulay seeks reimbursement for all expenses arising from its Carmack Amendment summary judgment motion and memoranda. This Court has now vacated the Opinion but has entered no order that Mulay is not entitled to summary judgment on the Carmack Amendment. It

more than $1,751.50 was reasonably justified. Neither party's submissions have requested an evidentiary hearing or identified any issues that can be resolved only by live testimony. 9/ This opinion therefore makes a final determination of Mulay's entitlement (subject only to the possibility referred to in n.8).

[begin p. 11:] Mulay's $4,334.20 total comprises a thoroughly itemized $3,964 in "attorneys' fees" (including a summer associate's fees) and $370.20 in expenses, itemized by months. Grand Trunk disputes neither the reasonableness of the expenses nor the requested hourly rates. Apart from its challenge in principle already dealt with, Grand Trunk lodges four objections to Mulay's petition:

Footnote Continued

is possible (though perhaps unlikely) Mulay may renew its motion despite Wehrley's testimony. In that event it would probably be able to reuse most if not all the work already done on the Carmack Amendment. This opinion's findings on the amount of Mulay's entitlement to fees assume the non-renewal of its motion. If events turn out otherwise, a corrective order will be entered.

9/ Fees hearings create the potential for fees on fees, needlessly raising the stakes. See Muscare v. Quinn, 680 F.2d 42 (7th Cir. 1982). Thus parties are most often well advised to submit the question on the papers, as they have done here.

1. Mulay's expenses in opposing Grand Trunk's motion to vacate the Opinion were not sufficiently related to its summary judgment motion and should be denied entirely.

2. Mulay's principal attorney in this case, Eric N. Laudau ("Landau"), and summer associate Allan M. Bittker ("Bittker") devoted an excessive amount of time--38.5 hours--to researching and drafting Mulay's motion and supporting memorandum. Grand Trunk proposes 16 hours be allowed.

3. Landau's supervisor Francis X. Grossi, Jr. ("Grossi") should have spent only 1 hour, not 2.4 hours, reviewing the motion and memorandum.

4. Landau should have spent no more than 8 hours, not 9.3 hours as he did, preparing Mulay's reply.

Only the second argument has any merit, and Mulay's award will be adjusted accordingly.

As for the first objection, Mulay's opposition to Grand Trunk's motion to vacate is properly chargeable. Like discovery sanctions, the present award "should encompass all expenses, [begin p. 12:] whenever incurred, that would not have been sustained had the opponent conducted itself properly." Aerwey Laboratories, Inc. v. Arco Polymers, Inc., 90 F.R.D. 563, 565-66 (N.D. Ill. 1981), recently quoted approvingly in Tamari v. Bache & Co., 729 F.2d 469, 475 (7th Cir. 1984). Here Grand Trunk's failure to produce evidence made its motion to vacate,

and therefore Mulay's opposition to it, necessary.

Grand Trunk's second objection requires an evaluation of time spent, always difficult in hindsight. That is particularly true of research time: It is nearly impossible to second-guess how much time was reasonably spent on research. Where as here the services were incurred without contemplation of recovery, and will be borne by the client if not allowed for reimbursement, they should be borne by the party that caused the problem absent some real indication of unreasonableness. Thus the 13.7 hours charged by Bittker for research are allowed as reasonable.

Less difficulty in evaluation is posed by other claimed items. For example the May 25, 1983 conference time (for both Landau and Bittker) will be disallowed because the differential between Bittker's and Landau's hourly rates was minimal (rendering non-existent the ordinary justification for delegation: the generation of appropriate economies). That conference was really more a matter of the law firm's convenience than anything else. On the propriety of fee awards to cover the expense of such conferences, see Levka v. City of Chicago, No. 83 C 2283, slip op. at 3 (N.D. Ill. Apr. 27, [begin p. 13:] 1984).

More important, the total of 23.2 hours for Landau's drafting of the summary judgment motion, where a partner also took 2.4 hours for reviewing and editing, is excessive. There is a meaningful distinction between this

Court's ability to review time required for writing and related work and its inability to determine what is reasonable in terms of background research. Therefore 8 hours of Landau's time, at $55 an hour, are disallowed. 10/ That brings the total reduction warranted by Grand Trunk's second objection to $513.50.

On the third objection, Grand Trunk's proposed 1 hour limit on Grossi's time ignores the fact he was responsible for editing as well as reading the motion and memorandum. This Court has taken into account the 2.4 hours of Grossi time in reducing by 8 hours the time Landau could reasonably have spent drafting the original version. Consequently no reduction of Grossi time is called for.

Grand Trunk's final objection is that 9.3 hours could not be reasonably spent preparing a reply, while it concedes 8 hours could be. That kind of fine tuning bespeaks a prescience no more available to Grand Trunk that to this Court. This Court will not accept Grand Trunk's wholly conclusory invitation [begin p. 14:] to impose such an arbitrary reduction.

10/ Mulay's R. Mem. 3 n.2 and 4 n.3, objecting to Grand Trunk's recalculation of Mulay's fees after its proposed reductions, misses the fact that when Landau's services were rendered he was billing his time at $55 an hour, rather than $65 an hour as he does today.

Conclusion

This Court disallows $513.50 of the requested $4,334.20 reimbursement of Mulay's expenses due to Grand Trunk's failure to produce relevant evidence to preclude summary judgment. Grand Trunk is ordered to pay Mulay $3,820.70 by May 21, 1984.

/s/ Milton I. Shadur
Milton I. Shadur
United States District Judge

Date: May 8, 1984

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1905
MULAY PLASTICS, INC.,

Plaintiff-Appellee,

v.

GRAND TRUNK WESTERN RAILROAD CO.,

Defendant-Appellant.

No. 84-1902
THE MAGNAVOX COMPANY,

Plaintiff-Appellant,

v.

BALLY MIDWAY MANUFACTURING COMPANY,

Defendant-Appellee.

No. 84-2059
THE MAGNAVOX COMPANY,

Petitioner,

v.

HONORABLE PRENTICE H. MARSHALL, Judge
for the Northern District of Illinois,

Respondent.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 82 C 7631—**Milton I. Shadur,** *Judge.*
No. 83 C 2357—**Prentice H. Marshall,** *Judge.*

SUBMITTED JULY 9, 1984—DECIDED AUGUST 22, 1984

Before CUMMINGS, *Chief Judge*, and POSNER and FLAUM, *Circuit Judges*.

POSNER, *Circuit Judge*. We have consolidated these two appeals (and one mandamus petition) to consider what is likely to be a recurrent question under the recent amendments to the Federal Rules of Civil Procedure (effective August 1, 1983) strengthening the powers and responsibilities of federal district judges to mete out sanctions for procedural abuse: the immediate appealability of orders imposing such sanctions. The issues have been fully briefed, and are ripe for disposition.

In *Mulay*, the district judge ordered the appellant to pay the appellee $3,820.70 as a sanction for failing to produce relevant evidence in connection with the appellee's motion for summary judgment. The motion was denied, and the case is continuing. The order to pay is not final in the sense of winding up a lawsuit, and is appealable if at all only under the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). That doctrine allows the immediate appeal of some orders which, while not injunctions and so not appealable under 28 U.S.C. § 1292(a)(1), have the same effect as injunctions: they inflict irreparable harm. See *Illinois v. F.E. Moran, Inc.*, No. 83-1594, slip op. at 5 (7th Cir. July 24, 1984); *In re UNR Industries, Inc.*, 725 F.2d 1111, 1117-18 (7th Cir. 1984). But an order to pay money as a sanction for abuse of discovery usually does not—and in this case did not—inflict irreparable harm on the party (Grand Trunk) ordered to pay. If, on appeal from the final judgment in this case, Grand Trunk convinces this court that the sanction should not have been imposed, it will get its money back then. See, e.g., *Kordich v. Marine Clerks Ass'n*, 715 F.2d 1392, 1393 (9th Cir. 1983) (per curiam); *Eastern Maico Distributors, Inc. v. Maico Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 947 (3d Cir. 1981). There is no argument either that the appellee, a substantial corporation, will not be good for the trifling sum of money involved, if ultimately ordered to return it, or that the appellant, also a substantial corporation,

will suffer a liquidity crisis by being deprived of this amount during the interim.

As there is nothing irreparable about the harm that the order to pay has done the appellant, appeal under the *Cohen* doctrine is not permissible. This is the usual conclusion reached in cases where parties try to appeal sanctions imposed during the discovery process, before a final judgment is entered. See, e.g., *Eastern Maico Distributors, Inc. v. Maico Fahrzeugfabrik, G.m.b.H., supra*, 658 F.2d at 947; *In re Underwriters at Lloyd's*, 666 F.2d 55, 58 (4th Cir. 1981). It is true that *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1372 (10th Cir. 1978), is *contra*, but it has not been followed in any other circuit, and the force of its reasoning is weakened by the failure to refer to the irreparable-harm requirement of the *Cohen* doctrine. It is also true that judgments of criminal contempt, sometimes entered as sanctions for abuse of discovery, are appealable. *United States v. Ryan*, 402 U.S. 530, 532-33 (1971). But if someone is adjudged guilty of a crime, he ought to be able to appeal as soon as possible; the general interest in expediting criminal proceedings is engaged even by a contempt proceeding. Apart from criminal contempt and some other exceptional cases, well illustrated by *Knorr Brake Corp. v. Harbill, Inc.*, No. 83-1318, slip op. at 5 (7th Cir. June 29, 1984), where the sanction was against nonparties, and *In re UNR Industries, Inc.*, No. 83-3073, slip op. at 4 n. 2 (7th Cir. June 6, 1984), where the appeal was from an order in bankruptcy, an area where interlocutory appeals traditionally are liberally allowed, see *In re Saco Local Development Corp.*, 711 F.2d 441, 444 (1st Cir. 1983), sanctions for abuse of discovery, like other discovery orders, are not appealable orders in the federal system, unless the party sanctioned can bring his appeal within the *Cohen* doctrine by showing that all the elements of the doctrine are present.

Magnavox is a virtually identical case: the appellee was awarded $8,000 in attorney's fees and expenses incurred to compel the appellant to produce certain documents in discovery. This award is not appealable, for reasons we

have already explained; and it adds nothing that the appellant here has also asked for a writ of mandamus to direct the district judge to vacate the award. Mandamus may not be used to get around the limitations on the appealability of interlocutory orders. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (per curiam). It also adds nothing that the judge certified his order awarding sanctions for an immediate appeal under Rule 54(b) of the Federal Rules of Civil Procedure. The rule allows an immediate appeal in some circumstances from an order finally disposing of a separate "claim for relief," but this has been held to mean a substantive claim, see *Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555, 560-61 (7th Cir. 1975); *Seigal v. Merrick*, 619 F.2d 160, 164 n. 7 (2d Cir. 1980); *Redding & Co. v. Russwine Construction Corp.*, 417 F.2d 721, 726 n. 33 (D.C. Cir. 1969); *Atkins, Kroll (Guam), Ltd. v. Cabrera*, 277 F.2d 922, 924 (9th Cir. 1960), and the separate claim here was not substantive. The language of Rule 54(b) leaves little room for doubt that it indeed is limited to substantive claims: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim . . ."; compare Rule 8(a). In any event this reading is compelled by good sense; otherwise a class of interlocutory orders would be reviewable prematurely.

The appeals in these two cases are DISMISSED, and the petition for mandamus is DENIED. Costs in this court are awarded to the appellees.

A true Copy:

Teste:

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

GRAND TRUNK WESTERN RAILROAD,

Petitioner

v.

MULAY PLASTICS, INC.,

Respondent

PROOF OF SERVICE -
CERTIFICATE BY BAR MEMBER

I, DEAN M. TRAFELET, one of the attorneys for Grand Trunk Western Railroad, Petitioner-Appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 20th day of November, 1984, I served copies of the foregoing Petition for Writ of Certiorari on the several parties thereto, as follows:

On Respondent-Appellees by mailing copies in duly addressed envelopes with first class postage prepaid, to their respective attorneys of record as follows:

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